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I. INTRODUCTION

Should people who seek fundamental changes in the United States' political and economic systems become judges? I want to consider this question from the perspective of those persons—whom I will call "radicals"—and from ethics. The first issue requires an understanding of legal radicalism, especially its analysis of judicial power. The radical will want to be a judge only if it furthers her cause. The second consideration—legal ethics—investigates whether there is a principled reason to be wary of radical judges, as opposed to liberal or conservative ones.

As a preliminary matter, it will be useful to clarify what I mean by "radical." In law, radicalism is most closely associated with critical theory, including critical legal theory, feminist jurisprudence and critical race theory.[1] Defining these movements is almost as difficult a task as

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1. *See* DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON AMERICAN LAW 5 (1997) (describing radical multiculturalists as "adherents of a broad assortment of theories, including critical race theory, radical feminism, and legal writings about gays and lesbians"); Elizabeth M. Iglesias, *Latcrit Theory: Some Preliminary Notes Towards a Transatlantic Dialogue*, 9 U. MIAMI INT'L & COMP. L. REV. 1, 9 (2001) ("Critical Legal Studies emerged as a loosely aligned and radically progressive network of scholars working in the American legal academy in the latter half of the 1970s."). Some scholars have also described Law and Economics jurisprudence as radical. *See, e.g.*, Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 187 n.100 (1984) (describing Law and Economics as both radical and conservative); Charles K. Rowley, *Wealth Maximization in Normative Law and Economics: A Social Choice Analysis*, 6 GEO. MASON L. REV. 971, 995 (1998) (noting that Law and Economics is driven by a conservative group of scholars supporting a "very radical principle"); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1862 (1988) (explaining that Law and Economics and Critical Legal studies both urge a radical transformation of the judicial decision-making process). *See also* Cedric Merlin Powell, Hopwood: Bakke II *and Skeptical*

defining radicalism generally (or "liberalism" or "conservativism").[2] In fact, one of the objectives of the critical theory project has been to articulate how it differs from ordinary liberal politics. For the purposes of this article it may be more helpful to articulate some positions that a radical might hold, and then to analyze whether these positions might interfere with her duties as a judge.[3]

Duncan Kennedy, a prominent critical legal theorist, has described a "set of intentions" that a judge might have in deciding a case. We can think of Kennedy's listing as a kind of mission statement for the radical judge. Writing in the persona of the judge, Kennedy says:

> I see myself as a political activist, someone with the "vocation of social transformation," as Roberto Unger put it. I see the set of rules in force as chosen by the people who had the power to make the choices in accord with their views on morality and justice and their own self-interest. And I see the rules as remaining in force because victimized groups have not had the political vision and energy and raw power to change them. I see myself as a focus of political energy for change in an egalitarian, communitarian, decentralized democratic socialist direction.[4]

Generally speaking, legal radicals do not believe in the rule of law. They assert that the law is politics, and that judges use their personal values to decide cases. They think that the law is indeterminate—at least in hard cases. They are instrumentalists.[5]

Scrutiny, 9 SETON HALL CONST. L.J. 811, 821 n.41 (1999) (describing the jurisprudence of Justices Rehnquist, Scalia and Thomas as radical conservative).

2. *See* Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics and Deep Capture*, 152 U. PA. L. REV. 129, 182 (2003) (noting that critical legal theory, critical race theory and feminist jurisprudence can be described as having "serious reservations about how 'knowable' our world is, about the existence of truly neutral, apolitical social sciences and legal doctrines, and about the independence of judges, scholars, and other reputedly neutral actors and institutions from the influence of existing allocations of power").

3. Not every radical will subscribe to each of these beliefs.

4. *See* Duncan Kennedy, *Imagining a Judge's Reasoning Process*, *in* ANALYTIC JURISPRUDENCE ANTHOLOGY 204 (Anthony D'Amato ed., 1996).

5. *See generally* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); ROBERTO M. UNGER, KNOWLEDGE & POLITICS 89–92, 97–98 (1976) (explaining that judges who issue instrumentalist opinions rely on firmly established personal values in the guise of legal reasoning to render their decisions); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984) (panel discussion from symposium on critical legal studies). Mark Tushnet and Joseph Singer maintain that legal rules never produce determinate results in real cases. *See* MARK V. TUSHNET, RED WHITE, AND BLUE: A

There are judges who seem to adhere to weak, watered down versions of critical theory. These judges are more "liberal" than radical. Justices Thurgood Marshall and Ruth Bader Ginsburg are examples of this kind of judge.[6] Although the suggestion that liberal judges should be disqualified by virtue of their politics (or other aspects of their identity) is not unknown,[7] I want to consider the more difficult case—whether people who are to the left of liberal should aspire to the bench and, if they do, whether there is any ethical reason to prevent them from attaining it.

II. WHY WOULD A RADICAL WANT TO BE A JUDGE?

Judges, in the traditional view, interpret law. Radicals don't buy this, at least not in the formal or pragmatic meaning of interpretation.[8] They think that judges actually make law, because the indeterminacy of

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CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 191–92 (1988); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 11–12 (1984).

6. *See, e.g.*, Philippa Strum, *Change and Continuity on the Supreme Court: Conversations with Justice Blackmun*, 34 U. RICH. L. REV. 285, 287–88 (2000) ("Blackmun pointed to Justice Thurgood Marshall as an example of a Justice who was usually characterized as a 'liberal' and who participated in many decisions that might well be typified as such, but whom Blackmun described as 'basically conservative.' By that he meant that Marshall preferred to 'work within the system' when it was at all possible—a preference with which Blackmun was in full sympathy, although he recognized that it was not one held by all the Justices."); Deborah Jones Merritt & David M. Lieberman, *Ruth Bader Ginsburg's Jurisprudence of Opportunity and Equality*, 104 COLUM. L. REV. 39, 48 (2004) ("Ruth Bader Ginsburg has always eschewed labels of 'conservative' or 'liberal' for herself and other judges. . . . [S]he is both a conservative—someone who maintains our oldest ideals—and a liberal—one who beckons us to new worlds.").

7. *See, e.g.*, MacDraw, Inc. v. CIT Group Equip. Fin., Inc., 138 F.3d 33, 38 (2d Cir. 1998) (upholding sanctions imposed by trial judge against attorneys who suggested that the judge recuse himself based upon his status as an Asian-American and Clinton administration appointee); *see also In re* Mason, 916 F.2d 384, 386 (7th Cir. 1990) (denying a writ of mandamus to disqualify a judge because he made pre-appointment contributions of $100 to each of the defendants). A judge's former political affiliation does not create an appearance of impartiality. *See* United States v. Alabama, 828 F.2d 1532, 1543 (11th Cir. 1987) (refusing to disqualify a judge, who had acted as plaintiffs' counsel in a civil rights suit in the past, from presiding over an action to desegregate Alabama universities). "The fact that a trial judge harbors political views, religious persuasion or values that are in direct opposition to those of the defendant does not, standing alone, constitute a basis for recusal." Welsh v. Commonwealth, 416 S.E.2d 451, 461 (Va. Ct. App. 1992).

8. A pragmatist judge would be "practical, instrumental, forward-looking, activist, empirical, skeptical, antidogmatic, experimental." RICHARD A. POSNER, OVERCOMING LAW 11 (1995). A judge does not have an "obligation to maintain a 'fit' between what he does and what his predecessors did." *Id.* A formalist, on the other hand, would try to follow rules previously set out by legislation or common law and allow these rules to decide as much of the case as possible. *See* Laura E. Little, *Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U.C. DAVIS L. REV. 925, 966–67 (2004). The result is that, in a given case, the judge ends up actually deciding a very small point of law.

law makes any kind of "objective" interpretation impossible. One might imagine, then, that in the radical view judges have a lot of power. In a way, yes, but in another way, no. Many radicals are dubious about the ability of the law to improve the plight of subordinated people.[9] They believe that "all systems of law are constructed to protect the state and its economic base. Conduct that seriously threatens the survival of the state or that would effectuate a basic change in its economic system is, *ipso facto*, 'illegal.'"[10] From this perspective, judges make law, so they are as powerful as the law, which is to say, not very powerful as far as remedying economic or social oppression is concerned.[11]

An important inquiry, then, is why would a radical want to be a judge? She believes that American society requires fundamental transformation, but she doubts that the law can do this. In her view, the law is an opiate, or worse, a tool of capitalist oppression.[12] Our potential judge, however, is a lawyer. This means that already she has lowered expectations about her role in the radical project. She has decided against taking it to the streets. Instead she is working within, or through, or around the law.

Thus, the radical contemplating the bench compares the good that she could do there with the good that she is doing as a lawyer. The average judge might have more power than the average lawyer, even if neither can change society. In the radical view, a judge has the same kind of potential to help the oppressed as a supervisor in a social worker's office. Our potential jurist could reason that it is better to be the boss than to be an employee. As a judge, she can mediate disputes, and pressure parties into settlements that seem fair. She can make incremental changes in the law. She cannot reallocate wealth on a grand scale, but perhaps she can shift here and there.

Of course, the judge can only adjudicate the cases before her. In many, perhaps most of the cases on her docket, she would not have the

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9. *See* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 377–78 (1992); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1350 (1988).

10. Victor Rabinowitz, *The Radical Tradition in the Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 427 (David Kairys ed., rev. ed., 1990) (emphasis in original).

11. *But see id.*

12. Some radicals have expressed slightly more hopeful views about the law. Kimberlé Crenshaw, for example, has argued that the law can help relieve symbolic subordination, as opposed to material subordination. *See* Crenshaw, *supra* note 9; *see also* Rabinowitz, *supra* note 10; PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 148–65 (1991).

opportunity to do her radical work. The law is not an especially helpful mechanism for re-allocating wealth between haves and have-nots. Poor people do not seem to have high expectations of it.[13] If most of what the judge would do would be to re-shuffle money from one privileged party to another, she could reasonably decide that she could help more poor people as a lawyer/advocate than as a judge.

The poor, however, dominate criminal court.[14] If the judge hears criminal cases, she can try to affect the outcome of individual cases in a way that she thinks is just. She can, for example, dismiss cases, or mitigate punishment, when racial profiling seems responsible for the initial police attention to the defendant.[15] In bench trials, she can nullify in cases in which she believes prosecutors have misused their discretion. In deciding motions to suppress evidence, she can subject the testimony of police officers to the same standards as any other witness.[16]

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13. *See* ALBERT H. CANTRIL, ABA, AGENDA FOR ACCESS: THE AMERICAN PEOPLE & CIVIL JUSTICE (1996) (summarizing the findings of the Comprehensive Legal Needs Study and concluding that "[e]ach year about half of all low- and moderate-income households in the United States face a serious situation that raises a civil legal issue. But neither low-income nor moderate-income households bring the overwhelming proportion of such situations to any part of the justice system"), *at* http://www.abanet.org/legalservices/delivery/delunbundbook.html; Mark Lloyd, *The Digital Divide and Equal Access to Justice*, 24 HASTINGS COMM. & ENT. L.J. 505, 508–09 (2002) (reporting results of an ABA study that "found that each year about half of poor and moderate-income households face a serious legal situation, but only about one-third of this half bring their problem to either an attorney or to court").

14. *See* STEVEN K. SMITH & CAROL J. DEFRANCES, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE 4 tbl.8 (1996) (reporting that in 1992, fifty-nine percent of felony defendants in the nation's seventy-five largest counties had a public defender and twenty-two percent had court-appointed counsel), *at* http://www.ojp.usdoj.gov/bjs/pub/pdf/id.pdf; JEFFREY H. REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS AND CRIMINAL JUSTICE 48–49 (citing U.S. DEP'T OF JUSTICE: UNIFORM CRIME REPS. FOR THE U.S.: 1993, at 216, 227–28, 234–35 (1994) (noting that one of the typical characteristics of the inmate is that "he is poor: Among state prisoners in 1991, thirty-three percent were unemployed prior to being arrested—a rate nearly four times that of males in the general population. Among those state prisoners who had incomes prior to being arrested, nineteen percent earned less than $3,000 a year (compared with 6.8 percent of males in the civilian labor force), and half earned less than $10,000 a year (compared with twenty-five percent of non-institutionalized males)"); *see also* Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 359 (2004) ("Most criminal defendants are fairly poor, and the families and communities to whom they are connected are poor as well."). Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2546 (2004) ("Criminal defendants are disproportionately poor young men.").

15. *See, e.g.*, United States v. Leviner, 31 F. Supp. 2d 23, 33 (D. Mass. 1998) (Gertner, J.) (departing downward from the U.S. Sentencing Commission Guidelines where the African American defendant's criminal record reflected a number of "countable" motor vehicle offenses, and studies indicated disproportionate targeting of African Americans for such offenses).

16. Alan Dershowitz has said that "[m]ost trial judges pretend to believe police officers who they know are lying." ALAN DERSHOWITZ, THE BEST DEFENSE xxii (1982).

IS IT ETHICAL?

Can one ethically be a radical judge? The answer, obviously, depends on whose ethical construct is being considered. For this analysis, I will use the American Bar Association's Model Code of Judicial Conduct.[17] I selected this Code because it is both influential and fairly representative of state judicial codes. The ABA Model Code sets forth five canons:

> Canon 1: A judge shall uphold the integrity and independence of the judiciary.[18]
>
> . . . .
>
> Canon 2: A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.[19]
>
> . . . .
>
> Canon 3: A judge shall perform the duties of judicial office impartially and diligently.[20]
>
> . . . .

17. "The American Bar Association's Codes of Judicial Conduct are the foundation for judicial discipline and disqualification in American courts. Forty-nine of the states have adopted some form of the American Bar Association ("ABA") Codes." Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55, 55 (2000).

18. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1990). Canon 1 further provides that "[a] judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." *Id.*

19. *Id.* Canon 2. Canon 2A provides that "[a] judge shall respect and comply with the law . . . ." *See id.* Canon 2A. "Impropriety" for purposes of Canon 2 will include violations of the law, court rules, or the Model Code of Judicial Conduct. *Id.* cmt. 2.

20. *Id.* Canon 3. Canon 3A provides that the judicial activities of a judge take priority over all of her other activities. *See id.* Canon 3A. The Canon defines judicial duties to include "all the duties of the judge's office prescribed by law." *Id.*; *see also id.* Terminology (defining "law" to include court rules, statutes, constitutional provisions and court decisions). Canon 3B(2) provides that a judge "shall be faithful to the law and . . . shall not be swayed by partisan interests, public clamor or fear of criticism." *See id.* Canon 3B(2). Finally, Canon 3B(5) provides that "[a] judge shall perform judicial duties without bias or prejudice based upon race, sex, religion, national origin, disability . . . or socioeconomic status. . . ." *See id.* Canon 3B(5).

> Canon 4: A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.[21]
>
> . . . .
>
> Canon 5: A judge or judicial candidate shall refrain from inappropriate political activity.[22]
>
> . . . .

Probably Canons 2 and 3 most worry the radical judge. Canon 1 is too vague to provide a cause of action for anyone inclined to depose her. Canon 4 might require a judge to resign her membership in radical organizations, but it would apply also to judges who are members of the National Rifle Association or the American Civil Liberties Union. Our inquiry is whether any ethical considerations would have a different impact on radical judges than on judges of other political persuasions.

Canon 5 initially sounds prohibitive to the radical judge, but its subsections and commentary reveal that it is concerned with politics in a formal sense. It forbids judges from leading political organizations or making campaign contributions.[23] Here, again, the radical judge would be no more constrained than the Democrat or Republican one.

Canons 2 and 3 use words like "impropriety" and "impartially" that initially seem too general to restrict a radical from becoming a judge. Each canon, however, contains subsections that offer more limiting interpretations. Together these sections can be read as discouraging to radicals who seek the bench.

Canon 2A, for example, states "a judge shall respect and comply with the law . . . ." Canon 3B(2) requires that "a judge shall be faithful to the law." Canon 3B(5) states that "a judge shall perform judicial duties without bias or prejudice" including "prejudice . . . based upon socioeconomic status." Canon 3E(1) requires that a judge disqualify

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21. *Id.* Canon 4 (regulating or prohibiting extra-judicial participation in certain financial and business dealings, government and civic organizations, and the practice of law).

22. *Id.* Canon 5A(1)(a)–(e). Canon 5A(1)(a)–(e) provides that a judge or candidate for judicial office refrain from: (1) acting as a leader or holding an office in a political organization; (2) publicly endorsing or opposing another candidate for public office; (3) making speeches on behalf of a political organization; (4) attending political gatherings; or (5) soliciting funds for, paying an assessment or making a contribution to a political organization or candidate, or purchasing tickets for political party fundraisers and events. *Id.*

23. *See id.* at Canon 5(A)(1)(a), (e).

herself in a proceeding in which her "impartiality might reasonably be questioned."

Faithful adherence to these standards would require the ABA to oppose an openly radical judicial candidate. To the ABA, radical is unethical, even if the equation is not necessarily intuitive.

Perhaps this is only fair. The radical, after all, does not respect the law, and she is not particularly inclined to be faithful to it. When the law appears to go against how she thinks a case should come out, she will go with her own view.[24] She is biased against the rich and in favor of the poor. In a hypothetical case involving a dispute between a powerful person, say Bill Gates, and a less powerful person, say Bill Gates's cleaning lady, the radical would not be impartial. She would hope that Bill Gates's cleaning lady prevails.[25]

To the radical, however, the ABA's special attention to her propriety and bias may seem unfair. She believes that other judges are just as political and just as outcome determinative: they are either too ignorant to realize it, or they disguise it, i.e., they lie about it. She wonders if she is being penalized for being honest.

Indeed the radical judge is not necessarily opposed to ethical guidelines. She might even consider her radical work, including on the bench, bound by some ethical restrictions, even if her own considerations do not substantially overlap with those of the American Bar Association. It is, after all, probably some personalized construct of morality that inspired her radicalism in the first place.

Duncan Kennedy, for example, writes that as a judge, he would observe the following strictures, which blend moral and consequentialist concerns:

> First, I see myself as having promised some diffuse public that I will "decide according to law," and it is clear to me that a minimum meaning of this pledge is that I won't do things for which I don't have a good legal argument. . . .

24. There is some tension between the radical idea that the rule of law is indeterminate and the idea of the law "appearing to go against" how a judge thinks a case should come out. Some radicals have tried to resolve this tension by claiming that the rule of law is indeterminate only in hard cases, and that in easy cases there may be a "correct" legal answer.

25. It is legitimate to ask how far the judge would go in advancing the cleaning lady's cause. There probably is some line that she would not cross.

> Second, various people in my community will sanction me severely if I do not offer a good legal argument for my action. . . .
>
> Third, I want my position to stick. . . .
>
> Fourth, by engaging in legal argument I can shape the outcomes of future cases and influence popular consciousness about what kinds of action are legitimate. . . .
>
> Fifth, every case is part of my life-project of being a liberal activist judge. What I do in this case will affect my ability to do things in other cases, enhancing or diminishing my legal and political credibility as well as my technical reputation with the various constituencies that will notice. . . .
>
> Sixth, since I see legal argument as a branch of ethical argument, I would like to know for my own purposes how my position looks translated into this particular ethical medium.[26]

It probably does not come as a surprise that the American Bar Association prefers its judges non-radical, as opposed to radical. It is noteworthy, however, that the ABA construct of judicial ethics penalizes radical judges for their politics in a way that liberal and conservative judges are not penalized. This kind of viewpoint discrimination recalls the debate in the 1980s about whether radical scholars should teach in law schools, since they purported not to believe in the rule of law.[27]

In the academy, this controversy was apparently resolved in favor of the radicals, since people with radical politics continue to teach, and to receive tenure.[28] In the judiciary, the more likely result is that radical judges will go underground. They will not be open about the extent of their dissatisfaction with the status quo. They will proceed stealthily.

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26. Kennedy, *supra* note 4, at 208–09.

27. *See* Paul D. Carrington, *Of Law and River*, 34 J. LEGAL EDUC. 222, 227 (1984).

28. *See* Timothy W. Floyd, *Legal Education and the Vision Thing*, 31 GA. L. REV. 853, 866 (1997) ("This evolution in legal scholarship has not been without controversy. Just as the Legal Realists faced opposition from those wedded to the notion of legal science, so too postmodernist legal narratives have been subjected to attack and vilification. At the moment, the ultimate outcome of the conflict has not yet been determined. Although a perusal of a recent issue of the Current Index to Legal Periodicals immediately demonstrates that "outsider" scholarship is becoming increasingly mainstream, some prominent academics and jurists openly call for a counter-revolution.").

III. THE RADICAL JUDGE AT WORK

There are no self-avowed radical judges. Professor Peter Schank describes a critical legal theory judge as "that most unlikely creature of our imaginations."[29] In trying to imagine a "[c]rit judge," Judge Judith Kaye, of the New York Court of Appeals, also has wondered "if . . . there could be such a creature."[30]

There are, however, radical legal scholars. What if someone like Derrick Bell, Richard Delgaldo, Duncan Kennedy, or Catharine MacKinnon were appointed to the bench? Would their politics change their view of their work as judges, or would their work as judges change their politics? Mainstream academics mainly suggest the latter. Professor Suzanna Sherry claims that it is "no surprise" that "judges who express radical views in their scholarship often do not implement those views in their judicial decisions."[31] Professor Peter Schanck suggests that

> [T]he CLS judge, would be more inclined in actual practice to use the time-honored methods of interpretation than deconstruction, so as to retain credibility and avoid reversal on appeal or professional sanction. Even were the judge steadfastly to refuse to consider personal concerns about his or her professional status, the pull of the conventional approaches, resulting from the judge's socialization by and immersion in our legal system, might nevertheless prove irresistible.[32]

From critical legal theorists, we have examples of radical judging, at least in a theoretical sense. In a seminal article, Duncan Kennedy imagined that he was a trial judge resolving a labor dispute.[33] Likewise, Professors Derrick Bell and Catharine MacKinnon, in the guise of Supreme Court justices in 1954, wrote opinions for *Brown v. Board of Education*.[34] In analyzing these opinions, the scholarly skepticism about critical judging seems warranted: but for the fact that the play-judges are slightly more transparent about their politics, their opinions are

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29. Peter C. Schank, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2587–88 (1991).

30. John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 875 n.31 (2002) (quoting Judith S. Kaye, *Commentary by Judith S. Kaye*, 1988 ANN. SURV. AM. L. 265, 266 (1988)) (internal quotation marks omitted).

31. Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793, 800 n.37 (2003).

32. Schanck, *supra* note 29, at 2587–88 (footnote omitted).

33. *See generally* Kennedy, *supra* note 4 (describing the legal reasoning that the author would employ to resolve a labor dispute if he were a judge).

34. *See* Derrick Bell, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 185–200 (Jack M. Balkin ed., 2001); Catharine A. MacKinnon, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID, *supra*, 143–57.

indistinguishable from other judges, especially traditionally liberal judges. Perhaps what this reveals is that the law is an inherently moderating or conservative influence—as soon as one puts on a robe, she loses her radical aspirations.[35] On the other hand, it might be evidence that there are radical judges out there, but that they present as liberals.

Duncan Kennedy, as a judge, is assigned a case that presents a conflict between "the law" and "how-I-want-to-come-out." Kennedy posits five possibilities, without choosing one. He can 1) "[g]o along with the law; 2) "[w]ithdraw from the case; 3) decide based on his view of what the law should be; 4) decide "on the basis of an implausible legal argument"; or 5) decide against the injunction "on the basis of fact findings that [he] knows to be false."[36] Kennedy suggests any of these choices could be appropriate in a given case and that "[w]hether [judges] should always follow the law in cases of conflict is a question that we answer as best we can through reflection and argument about our political system, about the actual laws in force within that system, and about particular cases."[37] Kennedy's ambition is limited; he describes himself, if successful, as shifting the "mantle of legal legitimacy . . . a little."[38]

In their hypothetical opinions for *Brown v. Board of Education*,[39] radical legal scholars Catharine MacKinnon and Derrick Bell respectively concur with and dissent from a majority opinion that overturns *Plessy v. Ferguson*.[40] MacKinnon's concurrence declares that because the purpose of the segregation ordinance at issue is to maintain white supremacy, the ordinance offends equal protection; her rationale not only looks traditional, it looks old-fashioned. It is reminiscent of Justice Harlan's reasoning in 1896 in his famous *Plessy* dissent, which MacKinnon cites as "vindicated today."[41]

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35. *See* Kennedy, *supra* note 4, at 216.

36. *Id.* at 216–17.

37. *Id.* at 217.

38. *Id.* at 206.

39. *See* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID, *supra* note 34, at 143–57, 185–200.

40. 163 U.S. 537 (1896).

41. MacKinnon, in WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID, *supra* note 34 at 147. *See also* Jordan Steiker, *American Icon: Does It Matter What the Court Said in* Brown*?*, 81 TEX. L. REV. 305, 313 (2002) (reviewing *What* Brown v. Board of Education *Should Have Said*) ("Like Justice Harlan, [MacKinnon] explicitly connects segregation to the ideology of white supremacy.").

Bell's opinion is more explicitly political: he writes that white people will not allow the majority opinion to be enforced, and that black students would therefore be better off in segregated schools that actually have resources equal to white schools.[42] Bell's analysis reads less like a judicial opinion than MacKinnon's. Professor Jordan Steiker notes that "Those who criticize *Brown* as insufficiently 'law-like' would probably find fault in Bell's effort. . . . Nothing in Bell's opinion is particularly responsive to the *Brown* litigation itself. . . . His opinion is an essay on American racism, and Bell makes little effort to dress his insights in the language or style of Court opinions."[43]

Bell, however, like MacKinnon, makes arguments that suggest that his interpretation of the law (in this case the United States Constitution) is "correct."[44] Both radical scholars engage legal doctrine and hinge their outcomes on the law, as opposed to their own politics. In this sense, their opinions look like any other judicial opinions. They do not seem especially radical in form or content.

We might expect a radical judge to use more tools of deconstruction, including "trashing" the process, by, for example, giving short shrift to the illusory power of "argument" to decide a case.[45] An openly radical judge might be transparent about the fact that it is "pure politics" and not "legal analysis" that guides her vote.[46] Yet the socialization of the legal system, even the socialization of radical scholars in hypothetical cases, appears to be very powerful—it even constrains radical scholars in hypothetical cases. Thus the radical judge remains "the most unlikely creature of our imaginations."[47]

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42. *See* Bell, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID, *supra* note 34, at 196–99.

43. *Id.* at 319.

44. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522 (1980).

45. *See* Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 293 (1984) ("Here's one account of the technique that we in Critical Legal Studies often use in analyzing legal texts, a technique I call "Trashing": Take specific arguments very *seriously* in their own terms; discover they are actually *foolish* ([tragi]-*comic*); and then look for some external observer's *order* (*not* the germ of truth) in the internally contradictory, incoherent chaos we've exposed.").

46. *See, e.g.*, Paul Butler et al., *The Case of the Speluncean Explorers: Revisite: Justice Stupidest Housemaid*, 112 HARV. L. REV. 1917, 1920 (1999) (writing as "Justice Stupidest Housemaid" to portray a radical judge who uses "pure politics" to decide a case). *See also* Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1993–94 (1990).

47. *See* Peter Schanck, *supra* note 29, at 2587.